

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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Docket No. 1,050,186

ORDER

This matter comes before the Board upon remand by the Kansas Court of Appeals. The Board placed this matter on its summary docket for disposition without oral argument. E. L. Lee Kinch of Wichita, Kansas, served as a Board Member Pro Tem in this matter in place of Board Member John F. Carpinelli.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for claimant. Ali N. Marchant of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the June 28, 2011, Award. At oral argument before the Board on September 16, 2011, the parties stipulated that following the accident that gave rise to this claim, claimant sustained a 10% permanent functional impairment for loss of use of each forearm. Respondent, however, maintained it was entitled to a credit for claimant's preexisting functional impairment resulting from a 2000 work-related injury, which led to a workers compensation claim and settlement.

ISSUES

In a June 28, 2011, Award, ALJ John D. Clark granted claimant an award based upon a 10% loss of use of the left forearm and an award for a 10% loss of use of the right

forearm. ALJ Clark was silent on the issue of a credit for any preexisting functional impairment. Respondent appealed the Award to the Board. In an October 28, 2011, Order, a majority of the Board affirmed the ALJ's Award. One Board Member dissented.

In an unpublished opinion filed by the Kansas Court of Appeals on October 12, 2012, the Court reversed the Board's October 28, 2011, Order and remanded the matter to the Board, stating in part:

Our Supreme Court, particularly in the area of workers compensation, has declared that "an appellate court must give effect only to express statutory language, rather than speculating what the law should or should not be, and that we will not add something to a statute not readily found in it." *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 610, 214 P.3d 676 (2009). K.S.A. 44-501(c) directs that an award be reduced "by the amount of functional impairment determined to be preexisting." K.S.A. 44-501(c) does not state that an award will be reduced by the amount of functional impairment determined to be preexisting only if a respondent proves the amount of preexisting functional impairment by "competent medical evidence." Thus, the Board erred in adding this unstated statutory requirement to K.S.A. 44-501(c).

. . . .

[W]e reverse the Board's order and remand to the Board with directions to recalculate claimant's award omitting the "competent medical evidence" standard it imposed previously and make appropriate reductions, if any, based on the amount of functional impairment determined to be preexisting under K.S.A. 44-501(c).¹

Respondent requests the Board reduce claimant's functional impairment of 10% to each upper extremity at the level of the forearm by giving respondent an 8% credit for claimant's preexisting functional impairment. The credit would result in a final award based on a 2% functional impairment to each upper extremity at the level of the forearm.

Claimant argues the Board should find that respondent failed to meet its burden of proving the extent of claimant's preexisting functional impairment, as it offered no medical evidence, competent or otherwise, that would establish claimant's impairment before the most recent injuries.

The issue before the Board on this appeal is:

1. What is the nature and extent of claimant's preexisting bilateral upper extremity functional impairment?

¹ *Kirker v. Bob Bergkamp Construction Co., Inc.*, No. 107,058, 2012 WL 4937471 (unpublished Kansas Court of Appeals opinion filed Oct. 12, 2012).

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

The Board incorporates by reference the findings of fact contained in its October 28, 2011, Order.

Prior to working for respondent, claimant had a history of bilateral carpal tunnel problems. In 2000, while working at Cessna, claimant filed a workers compensation claim because of bilateral carpal tunnel syndrome. The docket number for that claim was 255,152. Dr. J. Mark Melhorn performed bilateral carpal tunnel releases in April 2000. Dr. Melhorn assigned a 7.05% permanent functional impairment for each upper extremity.

Claimant was examined by Dr. Pedro A. Murati, who assigned a 10% permanent functional impairment to each upper extremity. Claimant settled the claim on January 16, 2001. In the Agreed Award, the parties stipulated claimant had an 8% permanent functional impairment to each upper extremity as a result of the carpal tunnel condition.²

The Agreed Award in Docket No. 255,152 does not state that the impairment ratings of Drs. Melhorn and Murati are in accordance with the *AMA Guides*.³ However, the Agreed Award does state the reports of the two physicians are admitted into evidence without further foundation. At the regular hearing in this claim, claimant's attorney offered as an exhibit, without objection, the settlement transcript with records of Drs. Melhorn and Murati attached. The medical reports of Drs. Melhorn and Murati attached to the Agreed Award state that the impairment ratings they assigned are in accordance with the *AMA Guides*.

Claimant testified that after he underwent the carpal tunnel release surgeries in 2000, his symptoms were resolved. He also indicated that it was not until 2005 that he again began experiencing symptoms of carpal tunnel syndrome. Claimant filed an application for hearing on April 2, 2010, alleging a repetitive injury to the bilateral upper extremities.

On April 7, 2010, claimant saw Dr. David T. Gwyn, certified by the American Board of Orthopaedic Surgery as an orthopedic surgeon with a subspecialty in hand surgery. Dr. Gwyn performed a left carpal tunnel release on May 27, 2010, and a right carpal tunnel

² R.H. Trans., Cl. Ex. 1.

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

release on June 17, 2010. Dr. Gwyn opined that in accordance with the *AMA Guides*, claimant sustained no permanent impairment to either upper extremity.⁴

Claimant's counsel referred claimant to Dr. George G. Flutter, certified by the American Board of Physical Medicine & Rehabilitation. Dr. Flutter assigned claimant a 13% permanent functional impairment to each upper extremity, all attributable to claimant's current injuries. Dr. Flutter did not review the records of Drs. Melhorn and Murati and was unaware that they had previously assigned claimant a permanent impairment to the upper extremities. Dr. Flutter did acknowledge that claimant could have had a preexisting impairment after the 2000 surgeries.

The ALJ found that claimant has a 10% permanent impairment to each forearm as a result of the injuries that are the subject of this claim. At oral argument before the Board on September 16, 2011, the parties stipulated claimant suffered a 10% permanent impairment to each forearm after the accident that gave rise to this claim. The ALJ did not reduce the award for claimant's preexisting impairment. In fact, in his Award the ALJ did not mention respondent's request for a reduction in benefits pursuant to K.S.A. 2009 Supp. 44-501(c). Therefore, it is unknown whether the ALJ failed to address this issue, or considered and rejected respondent's request for a credit for prior impairment.

On October 28, 2011, a majority of the Board concluded that respondent failed to establish by competent medical evidence that claimant had a preexisting functional impairment. The Board majority noted that following claimant's 2000 surgeries, Dr. Melhorn opined claimant had a 7.05% functional impairment to each upper extremity, Dr. Murati 10%, but that claimant settled for an award based upon 8%. The Board majority stated:

Reducing claimant's award in the current claim, as suggested by respondent, would require a fact finder to guess the amount of claimant's preexisting impairment. Claimant's functional impairment after his 2000 injuries was never firmly established, as that claim was settled. . . .⁵

One Board Member dissented, stating,

Claimant's preexisting impairment lies somewhere between 7.05% and 10% to each forearm. Claimant agreed to an 8% impairment in 2001. I would find claimant's

⁴ Gwyn Depo., Ex. 3.

⁵ *Kirker v. Bob Bergkamp Construction Co., Inc.*, No. 1,050,186, 2011 WL 5341319 (Kan. WCAB Oct. 28, 2011).

preexisting impairment was 8% to each forearm. Pursuant to K.S.A. 2009 Supp. 44-501(c), the award should be reduced accordingly.⁶

As stated above, the Kansas Court of Appeals reversed the Board's Order and remanded this matter to the Board with directions to recalculate claimant's award omitting the "competent medical evidence" standard and make appropriate reductions, if any, based on the amount of functional impairment determined to be preexisting under K.S.A. 44-501(c). The parties agreed, on remand, to submit briefs to the Board and waive oral argument.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-501(a) in part states: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2009 Supp. 44-501(c) states:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The Kansas Court of Appeals in *Hanson*⁷ states that once a claimant provides evidence that he or she aggravated a preexisting condition, the respondent has the burden of proving the claimant's amount of preexisting impairment as a deduction from total impairment. In *Hanson*, the court noted "Hence, the claimant need only show aggravation or acceleration of the condition and a causal relationship between the work-related injury and the disability. Once the claimant shows increased disability, compensation is for the full amount of disability less any amount of preexisting impairment established by the respondent. This is also pragmatic."⁸

⁶ *Id.*

⁷ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

⁸ *Id.*, at 96.

Neither party disputes the Board majority's finding that claimant has a 10% permanent functional impairment for loss of use of the left forearm and a 10% permanent functional impairment for loss of use of the right forearm. The issue is the extent, if any, of claimant's preexisting bilateral upper extremity functional impairment.

If a work-related event causes an aggravation of a preexisting condition, the employee is entitled to compensation for an increase in the functional impairment. In such claims, *Hanson* provides that the respondent has the burden of proving the claimant's amount of preexisting impairment as a deduction from total impairment. Respondent contends claimant has an 8% preexisting functional impairment to each upper extremity. Claimant asserts respondent has failed to prove the extent of claimant's preexisting impairment.

Claimant introduced into evidence, without objection, the medical reports of Drs. Melhorn and Murati that were made exhibits to the Agreed Award of January 16, 2001. Dr. Melhorn opined claimant had a 7.05% impairment to each upper extremity while Dr. Murati opined claimant had a 10% impairment to each upper extremity. Dr. Gwyn opined claimant had no permanent functional impairment and did not testify as to the amount of claimant's preexisting functional impairment.

Dr. Fluter was unaware that claimant was assigned a permanent functional impairment by Drs. Melhorn and Murati following claimant's surgeries in 2000. Dr. Fluter acknowledged claimant may have had a preexisting functional impairment, but did not testify as to the amount of the preexisting functional impairment. He attributed all of claimant's functional impairment to the carpal tunnel syndrome that developed after 2005.

With regard to claimant's preexisting functional impairment, the Board finds the 7.05% functional impairment to each upper extremity as opined by Dr. Melhorn is more credible than the 10% functional impairment to each upper extremity as opined by Dr. Murati. Dr. Melhorn is an orthopedic physician, who specializes in treatment of the hands and upper extremities. Perhaps even more important, Dr. Melhorn was claimant's treating physician following claimant's 2000 accident and in April 2000, performed bilateral carpal tunnel release surgeries on claimant.

CONCLUSION

As a result of claimant's 2000 work-related accident, claimant had a 7.05% functional impairment to each upper extremity at the level of the forearm. Following claimant's 2010 work-related accident claimant had a 10% functional impairment to each upper extremity at the level of the forearm. Therefore, claimant's 2010 work-related accident and injuries resulted in claimant having a 2.95% functional impairment to each upper extremity at the level of the forearm.

AWARD

WHEREFORE, the Board modifies the June 28, 2011, Award entered by ALJ Clark as follows:

Left forearm

Claimant is entitled to receive .07 weeks of temporary total disability benefits at the rate of \$546 per week in the amount of \$38.22, followed by 5.90 weeks of permanent partial disability benefits at the rate of \$546 per week in the amount of \$3,221.40, for a 2.95% functional impairment and a total award for the left forearm of \$3,259.62, which is all due and owing less any amounts previously paid.

Right forearm

Claimant is entitled to receive .07 weeks of temporary total disability benefits at the rate of \$546 per week in the amount of \$38.22, followed by 5.90 weeks of permanent partial disability benefits at the rate of \$546 per week in the amount of \$3,221.40, for a 2.95% functional impairment and a total award for the right forearm of \$3,259.62, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the June 28, 2011, Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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John D. Clark, Administrative Law Judge